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IN THE

Supreme Court of the United States

October Term, 1964.

No. 398

CALMAR STEAMSHIP CORPORATION,
Petitioner,

v.

JAMES THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner prays that a writ of certiorari shall issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 15, 1964. A timely petition for rehearing before the Court *en banc* was filed and denied May 20, 1964.

CITATION TO OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported 216 F. Supp. 234 and appears at 240a of the record herein. The decision of the Court of Appeals is reported 331 F. 2d 657.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was originally entered April 15, 1964. A petition for rehearing, pursuant to the rules of that Court, was timely filed and denied May 20, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED.

I. When a Longshoreman Employed by an Independent Stevedoring Contractor to Work Upon a Pier in Connection With Handling Cargo to Be Loaded Upon a Ship Is Injured by a Railroad Car Upon the Pier:

(A) Is the ship rendered "unseaworthy" and its operator, therefore, liable because the independent stevedoring contractor adopted an unsafe method of moving the railroad car upon the pier?

(B) Is the Constitutional right of the shipowner to trial by jury denied when the Court refuses to permit evidence to show that the work performed by the injured man was not work which had ever, historically, been performed by sailors who were members of the ship's crew?

(C) Is maritime law Constitutionally applicable?

STATUTES AND REGULATIONS INVOLVED.

The only statute involved is the proper interpretation of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496; 46 U. S. C. A. 740. Also involved are Article III, Section 2, Clause 1, of the Constitution and the Seventh Amendment to the Constitution.

STATEMENT OF THE CASE.

This diversity action was filed in the federal district court June 4, 1959, to recover damages for a personal injury sustained by the respondent (hereinafter "Thompson") in 1957. The complaint alleged that Thompson had been employed as a "longshoreman" in connection with the loading of cargo on board the petitioner's ship, SS ALAMAR. His complaint alleged (complaint, paragraph 7, 8a) that he "was assisting in moving the railroad cars containing the aforesaid cargo" which it was intended should be later loaded upon the petitioner's ship for carriage. It is uncontroverted that the actionable facts occurred upon the land. The "pier" referred to in the testimony was no mere structure upon piles or "extension of the land". The actionable facts occurred upon solid earth separated from navigable waters by a concrete wall alongside which lay the petitioner's ship (127a).

This federal court action was Thompson's second suit by reason of the injuries he had sustained. His first, still pending and undetermined in the state court, was against the railroad company which had transported the car loaded with cargo and placed it with others upon the pier (for want of a better term) which that rail carrier owned, operated and controlled. The pier was used by numerous water carriers, including petitioner, to dock ships for the loading and unloading of cargo.

The petitioner-shipowner had contracted with the independent stevedoring contractor which employed Thompson and assigned him to work in the rail cars while others of its employees went on board the petitioner's ship to load and stow the cargo. The two jobs require completely different skills (see testimony of Thompson's expert witness, 118a).

Cargo was being loaded into one of the ship's five hatches. It was a night shift and the work was carried on

by a single "gang" integrated as to skills, including hold men, or stowers, winch operators on deck, and "wharfmen" working in the rail cars fashioning bundles or sling-loads of the various sizes of cargo, hooking the slings onto the cargo hook so that they could be hoisted aboard, moving railroad cars, and otherwise performing work in all respects similar to freight handlers and railroad brakemen.

When the cargo had been completely removed from the rail car in which Thompson had been working, his foreman decided to move another loaded car into position alongside the hatch by moving it in an unusual way. There were two empty rail cars opposite the #1 hatch at the forward end of the ship. The cars which were to be unloaded next were opposite the after part of the ship, approximately opposite the #4 and #5 hatches. There were winches at each hatch, plus windlasses at the extreme bow and stern ends of the ship. Any one of these could have been used. Thompson's foreman elected a winch at the #3 hatch. It had been utilized earlier for a similar movement upon a different track (there were two sets of tracks running parallel to the water's edge). It was Thompson's foreman who gave instructions to move the loaded cars (33a) by pulling them with the winch at the #3 hatch. It was intended that when the cars were in motion they would strike the stationary cars opposite the #1 hatch, move them out of position and then, by utilizing the brakes on the rail car, one of the loaded cars would be "spotted" opposite the #1 hatch in position for unloading. The proposed operation was similar to the railroad operation of "humping".

Power from the ship's winch was applied through a wire cable (bullwire) from the winch outboard through a "hawse" (32a) in the ship's rail and back a distance of perhaps two hundred feet (33a) to the "cut" of three loaded cars. Once these stationary cars gained momentum, the winch was stopped, the hook dropped off (50a) and the cars ran free until they struck the standing cars and pushed them ahead so that one of the loaded cars could be stopped opposite the hatch.

Thompson stayed upon one of the empty cars to operate its brake. Upon impact, he was thrown to the ground and one of the wheels amputated his left leg.

No employee of this defendant directed the operation in any way, and there was no evidence whatever that ship's personnel were aware of the stevedore's intent to move the cars in this fashion. There was no jury finding of negligence, no evidence which would have supported such a finding if made, and any intimation in the opinion of the Court of Appeals to the contrary is nothing more than a "finding" by that Court that the railroad company which owned the pier might have supplied other equipment such as a shifting engine to move the rail cars.

Among the contested issues in the case was the applicability of maritime law to this shoreside accident. In addition to the locale of the accident, petitioner contended that Thompson was not a member of the class entitled to base his claim for recovery against the shipowner upon principles of maritime law, for the work *he* was doing was not such as had, historically, been performed by the ship's crew. The petitioner offered the testimony of a witness qualified as an authority in maritime history. Upon objection by Thompson, an offer of proof was made outside the hearing of the jury. The defendant offered to show by this witness that his extensive research into maritime history, not only of the United States but of England; Europe, Ancient Rome and Greece, and generally, the entire scope of maritime history, showed that work similar to that being performed by Mr. Thompson was work which was not, by history or tradition, work which had been performed by members of the crews of vessels. See 111 U. of Pa. L. R. 1137. In short, the petitioner's offer of proof was that the respondent was not a member of the class entitled to the protection of the warranty of seaworthiness. The offer was confined to the facts before the Court in this particular case. The work Mr. Thompson performed upon a pier handling cargo brought to the water's edge by another carrier and

intended to be off-loaded from the land carrier and loaded upon the water carrier was not work which had ever been the work of sailors who sailed ships. After the offer of proof the Court sustained the objection, ruling that the evidence (138a-154a) was immaterial.

REASONS FOR GRANTING THE WRIT.

I. A Ship Is Not Rendered Unseaworthy by an Unsafe Work Method Adopted by an Independent Stevedoring Contractor to Move a Railroad Car Upon Land.

(A) *There Is Conflict.*

In two decisions handed down on April 15 and 16, 1964 the Court of Appeals for the Third Circuit rejected what had always theretofore been an established concept of the doctrine of liability for unseaworthiness.[1] In the words of Judge Hastie dissenting below, unseaworthiness:

> ". . . signified some unfit, unsound or unsafe condition of the vessel or its gear or equipment. A vessel may be unseaworthy because of a structural defect, or because it is improperly manned, or because its equipment is defective or inadequate in some way. But, as I understand the facts in this case, the vessel and its gear were not defective in any way . . .". 331 F. 2d 657 at 663.

Certainly that is the import of this Court's decision in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Crumady v. The Joachim Hendrik Fisser*, 358 U. S. 423 (1959); and *Mitchell v. The Trawler Racer*, 362 U. S. 539 (1960). It is the necessary import of this Court's decision in *United New York and New Jersey Sandy Hook Pilots' Association*

1. The other is *Ferrante v. Swedish American Lines*, 331 F. (2) 571, petition for certiorari pending as of No. 275, October Term, 1964.

v. Halecki, 358 U. S. 613 (1959), for this court vacated the judgment upon the ground of unseaworthiness and remanded that case for trial upon the issue of *negligence*, whereas if an unsafe method of work *on board a ship* had the effect of rendering the vessel unseaworthy, the *Halecki* case would not have been decided as it was.

That every unsafe *method* of work which may result in injury does not create unseaworthiness of a ship and, therefore, impose liability has been the uniform holding within those circuits where the question has been clearly presented. In *Arena v. Luckenbach Steamship Co., Inc.*, 279 F. 2d 186 (C. A. 1, 1960); cert. denied 364 U. S. 895, that Court held that the ship was not rendered unseaworthy when a draft of cargo intended to be loaded aboard was being lifted from the dock to the ship. The intended cargo, rolls of paper, fell from the loading tray, or pallet, upon which they were being transported. A roll fell, struck the plaintiff working in the hold of the ship. The ship's equipment was not defective, and the First Circuit clearly held that this unsafe method of placing the rolls of paper on the cargo tray did not result in unseaworthiness of the ship.

We will refer to only a few of the many recent decisions in the Second Circuit. In *Guarracino v. Luckenbach SS Co.*, decided June 5, 1964, and not yet reported, that Court had before it a case where the ship "was properly equipped with fixed and portable ladders to permit safe egress from the hatch". The ship was not rendered unseaworthy because longshoremen elected to adopt an unsafe method of leaving the hatch and one of them was injured as a result. The Second Circuit notes that the Third Circuit in *Ferrante* and in the case at bar, ". . . espouse the view that the longshoremen's negligent use of the ship's equipment to create an unsafe condition may make the ship unseaworthy". The holding in the case, however, was that the ship there was [redacted] seaworthy.

Another Second Circuit decision is *Massa v. C. A. Venezuelan Navigacion, et al.*, decided June 3, 1964, not yet re-

ported. That was another case where cargo intended to be loaded on board spilled from the pallet which was transporting it from the dock into the ship's hold. In its decision in that case, the Second Circuit said:

> "Nor can we say that the plaintiff and his co-workers had rendered the ship unseaworthy by placing the tongs in the wrong holes. The doctrine of unseaworthiness requires no more than that a ship and appurtenances be reasonably fit for their intended use, and the trial court was justified in concluding that the pallets were reasonably fit. See Hooper v. Terminal Steamship Co., 296 F. 2d 281 (2 Cir., 1961); Pinto v. States Marine Corp. of Del., 296 F. 2d 1 (2 Cir., 1961), cert. den. 269 U. S. 843 (1962)."

In *Puddu v. Royal Netherlands Steamship Company*, 303 F. 2d 752 (2 Cir. 1962), cert. den. 371 U. S. 841, a longshoreman was injured when a ship's boom buckled and broke. The method of work adopted by the stevedore contractor on board ship had imposed unusual and dangerous stresses upon the boom. This improper method of operation by the stevedore was held not to render the ship unseaworthy. On the contrary, the ship was held seaworthy because the boom was not defective but the accident was caused solely by the negligent manner of the stevedore's operation.

In *Blankenship v. Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455 (1959), the Fourth Circuit held that the ship was seaworthy even though a carpenter working upon a scaffold fell when, because of a dangerous method adopted by other carpenters in shifting a draft of lumber, the scaffolding was dislodged. There the Fourth Circuit followed its own earlier decision in *Edwards v. Steinns*, 207 F. 2d 734 (1953), where the Court of Appeals affirmed a judgment in a case where the trial court had charged the jury that the shipowner would not be liable upon any ground of unseaworthiness if the jury found that the plaintiff's injury

was caused by the manner in which the longshoremen employed by the stevedore contractor operated the ship's winch so long as the winch itself was not defective.

In *Billeci v. United States*, 298 F. 2d 703 (1962), the Court of Appeals for the Ninth Circuit clearly and specifically stated:

> "The shipowner's warranty of seaworthiness does not extend to a negligent use by longshoremen of seaworthy appliances."

There, a ship's winch was involved. It had fallen out of gear because the operator of the winch, employed by the steevdoring contractor, did not insert a locking pin which was readily available and intended for use in the circumstances which there existed.

(B) *Aside From Conflict, the Decision Below Is Wrong.*

There are basic inequities and lurking Constitutional questions in a decision by a Court of Appeals which takes Calmar's money and gives it to Thompson because of the negligence of others. This is so whether it be dereliction on Reading Company in not providing on its pier equipment which would permit its rail cars to be moved in a different fashion [compare testimony of Stange, 103a to 111a and the testimony of Rehnert, 186a, 187a], or because the rail car being used allegedly violated the Safety Appliance Act, 45 U. S. C. A. 1 et seq. It is not a mere question of compensating an injured plaintiff. Compensated he should be, but by the persons who breached duties to him. These would include the Nickel Plate Railroad which owned the railroad car with the allegedly defective brake; the Reading Company which did not equip the pier which it owned, operated and controlled with proper appurtenances and appliances; and it certainly includes his employer who directed the manner in which the work was to be performed. It should not include Calmar, whose ship was properly equipped,

manned, and supplied, and whose ship was not unseaworthy under any definition of that term which has heretofore been used by this, or any other, Court outside the Third Circuit.

II. Is the Constitutional Right of the Shipowner to Trial by Jury Denied When the Court Refused to Permit Evidence to Show That the Work Performed by the Injured Man Was Not Work Which Had Ever, Historically, Been Performed by Sailors Who Were Members of the Ship's Crew?

The shipowner's Constitutional right to jury trial was denied when the court refused to permit evidence so that the jury could pass upon the question of whether the work being performed by Thompson was work which, historically, had been that performed by the sailors who comprised the ship's crew.

In the case at bar, there is no question that Thompson's injury was caused by the negligent manner in which he and his fellow workers elected to move a railroad car upon land combined with alleged defects in the car and the equipment provided for moving it. In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, this Court said:

> ". . . It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seamen's traditional and statutory protection, . . ."

It is worthwhile here to stress that one on the basic foundations of *Seas Shipping Co. v. Sieracki*, and the host of cases which have followed it, that "the work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew" (328 U. S. at 99).

* * *

> "It is that for injuries incurred while working on board the ship in navigable waters the stevedore is

> entitled to the seamen's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes, he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."

Whether Thompson was a member of the class to whom this duty was historically owed is a fact question. It has been treated as such ever since this Court's decision in *South Chicago Coal & Dock Co. v. Basset*, 309 U. S. 251. That it is a fact question is made clear from this Court's decision in *United New York and New Jersey Sandy Hook Pilot's Association v. Halecki*, 358 U. S. 613. There, this Court said:

> "Neither these decisions [Mahnich v. Southern SS Co., 321 U. S. 96, and Sieracki, supra] nor the policy that underlines them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea . . ." 358 U. S. at 617.
>
> • • •
>
> "It avails nothing to say that the decedent was 'an electrician', and that many modern ships carry electricians in their crew. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, explicitly teaches that such labels in this domain are meaningless . . ." 358 U. S. at 618.

The Court then goes on to point out "the basic *fact*" that the decedent, Halecki, "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed." 358 U. S. 618.

In *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, this Court said:

> "The many cases turning upon the question whether an individual was a 'seaman' demonstrates that the

matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. . . ."

In *Senko v. Lacrosse Dredging Co.*, 352 U. S. 370, this Court said:

"Our holding there that the determination of whether an injured person was 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." 352 U. S. at 374.

In *Partenweederei, M/S Belgrano v. Weigel*, 299 F. 2d 897, the Court of Appeals for the Ninth Circuit, holding in favor of a shipowner in a case of a longshoreman injured upon a dock, said:

"The only affirmative testimony in the record on the subject is uncontradicted expert testimony to the effect [Weigel's] work was not of the type traditionally performed by seamen. . . . The burden of proof was upon [Weigel] to show that he was entitled to the protection afforded seamen. In our view, he failed to do so." 299 F. 2d 902.

An application for certiorari was made to this Court in *Weigel* and was denied, 371 U. S. 830.

Thereafter, this Court granted certiorari in *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206. Thereafter, the petitioner in *Weigel* filed for rehearing and that was likewise denied, even though the petitioner there urged that consistency would seem to require that, if certiorari was to be granted in *Gutierrez*, it should have been granted in *Weigel*. A rehearing was denied, 371 U. S. 906. The

only difference between the two cases is the evidence referred to by the Court and quoted above. There the defendant offered evidence that the work Weigel performed was not of the type traditionally performed by seamen. Thus evidence which was dispositive of the issue in *Wiegel* was not even admissible in the eyes of the courts below in this case.

III. Maritime Law Is Not Constitutionally Applicable.

It is Article III, Section 2, Clause 1, of the Constitution which empowers federal courts to create, develop and apply the rules of decision which are collectively referred to as "the general maritime law". It is this Constitutional grant which

> " . . . empowers the federal courts in their exercise of the admiralty and maritime jurisdiction which has been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction', Crowell v. Benson, 285 U. S. 22, 55, and to continue the development of this law within Constitutional limits." *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 360-361.

The cause of action attempted to be asserted here does not constitute a maritime tort. If a tort at all, it is a terrene tort.

> "The whole, or at least a substantive cause of action arising out of the wrong must be completed within the locality upon which the jurisdiction depends—on the high seas or the navigable waters." *Hough v. Western Transportation Co.* [*The Plymouth*], 3 Wall 20 [70 U. S. 20].
>
> "The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred." *The Plymouth, supra.*

> "But in the amending and revising of the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction." *The Thomas Barlum* [*Detroit Trust Co. v. Barlum Steamship Co.*, 293 U. S. 21 at 44. "The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. The limits fixed by the Constitution to the judicial authority in the courts of the United States, would form an insuperable objection to this law, its validity dependent upon the commercial power." *The Genesee Chief*, 53 U. S. 443 at 452.

This basic concept of the water's edge as the limit of admiralty jurisdiction, and thus also the permissible limit of the application of maritime law has been consistently enunciated from Mr. Justice Story in 1815 to Mr. Justice Brennan in 1962. In *DeLovio v. Boit*, Fed. Cas. 3776, 7 Fed. Cas. 418, Justice Story had not "the slightest hesitation" in holding that the admiralty and maritime jurisdiction in civil cases involving tort "is necessarily bounded by locality". 7 Fed. Cas. at 444. In *Calbeck v. The Travelers Ins. Co.*, 370 U. S. 114 at 125, Justice Brennan clearly recognized that "the limit of navigable waters" spelled out the "limits of maritime jurisdiction".

The injury here took place entirely on land and was inflicted by a railroad freight car. It is mere sophistry to say that it is an injury "caused by a vessel" within the meaning of the language Congress used when it passed the Extension of Admiralty Jurisdiction Act, 46 U. S. C. A. 740. That statute extended admiralty and maritime jurisdiction of the courts of the United States to cases of injury to persons or things ashore "caused by a vessel in navigable water, notwithstanding that such damage or injury be done or consummated on land". The clear import of what Congress viewed as the Constitutional limits of its jurisdiction

can be obtained from Senate Report No. 1593, Vol. 1, U. S. Code, Congressional Service [80th Congress, 2nd Session 1948] Page 1898. This has always been the consistent view of Congress. See Senate Report No. 973, 69th Congress [1st Session] Page 16, quoted with approval by this Court in *Swanson v. Marra Bros., Inc.*, 328 U. S. 1. It is pertinent to note that *Swanson v. Marra Bros., Inc.* was decided the same day that this Court decided *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, where it said, *inter alia:*

> ". . . it is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections . . .". 328 U. S. at 99.

As Judge Hastie, dissenting below, put it:

> "But, as I understand the facts of this case, the vessel and its gear were not defective in any way. The winch and cable, part of the ship's gear, involved in this accident, were sound and worked perfectly. The trouble was that stevedores, not in the employ of the ship, negligently undertook to move one railroad car from its unloading position on the pier alongside the ship by bumping it with a train of oncoming cars."

The position which we urge is neither governed by, nor contrary to, the rule announced by this Court, in *Gutierrez v. Western Steamship Corporation*, 373 U. S. 206. There the bags holding a cargo of beans emanated from the ship in a defective condition. While the very work of unloading them with the ship's gear was going on, the contents spilled and made the place of work upon the pier dangerous. This was damage "caused by a vessel" as this Court interpreted the Extension of Admiralty Jurisdiction Act. The distinction between this case and *Gutierrez*, is, of course, that here nothing whatsoever was wrong or defective about this ship or its cargo. It was, therefore, improper for the courts below to apply maritime law to

this shoreside injury. In a tort action it is not status or service which create admiralty and maritime jurisdiction under the Constitutional grant. The rationale of the decision of the courts below bids fair to create a new "twilight zone" which should be examined and its metes and bounds delineated by this Court.

CONCLUSION.

For the foregoing reasons the writ should be granted; the case reviewed by this Court; and the judgment reversed.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,410

JAMES THOMPSON

v.

CALMAR STEAMSHIP CORPORATION,
Appellant

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 24, 1963

Before STALEY and GANEY, *Circuit Judges,* and NEALON, *District Judge*

OPINION OF THE COURT

(Filed April 15, 1964)

By NEALON, *District Judge*

Plaintiff, James Thompson, brought suit against defendant, Calmar Steamship Corporation, seeking to recover damages for injuries allegedly sustained as a result

of defendant's negligence and for breach of the warranty of seaworthiness under the principles of maritime law. The jury having returned a verdict for plaintiff in the amount of $118,000.00, defendant has filed this appeal.

The relevant facts are well summarized in the opinion of the Court below, as follows:

> "Plaintiff was one of a stevedoring company's gang of longshoremen employed to load shipments of steel aboard the defendant's vessel, lying anchored in navigable waters. The steel was being loaded directly from gondola freight cars in which it had been shipped and which were on the pier. During the evening and early morning hours of December 27-28, 1957, the work of loading had been going on. A number of cars had been unloaded and by approximately 3:30 to 4:00 A. M., there were six cars on the pier. The first in line, Car No. 1, had been unloaded some time before and the longshoremen had just completed the unloading of Car No. 2. It was necessary to move Car No. 2 from its position under the boom of the vessel which was opposite the No. 1 hatch and to bring Car No. 3 into its place. There was no shifting engine available to move the cars. The longshoremen therefore attached the bull line from the No. 3 hatch of the vessel to three loaded cars (Nos. 4, 5 and 6) which were coupled together about 150 to 300 feet away, and by employing the bull winch and utilizing the power of the ship's engines jerked the three loaded cars forward. Using the three cars as a kind of battering ram, as plaintiff's counsel well described it, they struck Car No. 3, driving it forward so that it would bump Car No. 2 out of its position. It was necessary, of course, to bring Car No. 3 to a stop when it reached the proper position under the boom. For this purpose one longshoreman stood near the track with chocks and another, the plaintiff, was stationed at the brake of Car No. 3.

"When the ship's line, drawn by the winch, pulled the three coupled freight cars into motion they struck Car No. 3 with such force that plaintiff was catapulted to the opposite side of the car and fell between it and the platform, on the side away from the vessel. Two of the wheels of Car No. 3 ran over his left leg and amputated it."

Before considering the arguments of appellant, certain basic propositions must be established. It is elementary that the owner of a ship is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment and it has been settled law in this Country ever since The Osceola, 189 U.S. 158 (1903). There can be no dispute also, that longshoremen, engaged in the service of the ship, are entitled to the same protection against unseaworthiness which members of the ship's crew would enjoy. Seas Shipping Company v. Sieracki, 328 U.S. 85 (1946). McKnight v. N. M. Paterson & Sons, Ltd., 286 F.2d 250 (6th Cir. 1960). The work of loading and unloading the ship is, as a matter of law, the work of the ship's service, performed until recent times by members of the crew. Hagans v. Ellerman & Bucknall Steamship Company, 318 F.2d 563 (3d Cir. 1963). The shipowner cannot escape liability by the simple means of delegating the loading function to an independent contractor. ". . . that the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection." Seas Shipping Company v. Sieracki (supra). Further, the unseaworthiness of a vessel or its equipment may arise from acts of the longshoremen crew or, indeed, of the injured longshoreman himself. Grillea v. United States, 232 F.2d 919 (2d Cir. 1956); Knox v. United States Lines Company, 294 F.2d 354 (3d Cir. 1961); Smith v. Lauritzen, 201 F. Supp. 663 (E.D. Pa. 1962).

If the longshoreman is actually engaged in the service of the ship, it is immaterial whether the accident caused by the vessel's unseaworthiness occurs away from the ship on the pier. Gutierrez v. Waterman Steamship Corporation, 373 U.S. 206 (1963). As Mr. Justice White observed in Gutierrez:

> "Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of Extension of Admiralty Jurisdiction Act, 46 USC § 740, swept it away when it made vessels on navigable water liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land.' Respondent and the carrier amici curiae would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman. Cf. Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (C. A. 2d Cir.); Hagans v. Farrell Lines, Inc., 237 F.2d 477 (C. A. 3rd Cir.). Nothing in the legislative history supports so restrictive an interpretation of the statutory language."

The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability, and this is true whether the unseaworthy condition be of a permanent or merely a temporary nature. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Alaska Steamship Co., Inc. v. Petterson, 347 U.S. 396 (1954). "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. *The method of loading her cargo,* or the manner of its storage

might be improper." (Emphasis supplied.) Morales v. City of Galveston, 370 U.S. 165 (1962).

Here we are faced with a highly questionable loading procedure. Plaintiff was a member of a longshoremen's gang engaged in loading a vessel, and in the course of doing so it fell to him to participate in an operation on land, but one intimately associated with the use of the ship's equipment, i.e., the bull winch and the bull line. As Judge Freedman so aptly stated in his opinion in the District Court:

> "What occasioned the accident and brought the warranty of unseaworthiness into operation was not the plaintiff's position on a freight car on a pier. It was rather the additional element of the use of the vessel's equipment and the physical attachment of the ship's line to the three loaded freight cars so as to make them the hammerhead to strike Car No. 3 into position by the application of the steam power of the ship's engines and the tightening of the line by the bull winch. A longshoreman injured by a defective ship's line cast from the vessel to the pier surely may be said to have been injured by unseaworthy ship's gear. Equally so would unseaworthiness exist if the ship's defective gear caused his injury by the fall of cargo which in itself was harmless. Here the otherwise harmless freight cars became animated by the power of the ship's engines and the physical connection of the ship's line. There is no insulation of unseaworthiness of the ship's line and its attachments merely because the attachments were not in themselves defective if used in some other manner." Thompson v. Calmar Steamship Company, 216 F. Supp. 234 (E.D. Pa. 1963).

In Robillard v. A. L. Burbank & Co., Ltd., 186 F. Supp. 193 (S.D.N.Y. 1960) (cited with approval in Gutierrez), the longshoremen crew used the vessel's winches,

which the Court found were operating properly, to unload lumber from the vessel. The lumber was being unloaded from the center of the deck at first and the Second Mate was dissatisfied with this procedure and so informed the stevedores inasmuch as he feared that the heavy loads passing over the remainder of the cargo on the side of the deck might "knock it off the dock." He remonstrated with the stevedores, but they continued their operation, and while one of the loads passed over the side it dislodged several pieces of the stacked lumber which fell over and hit plaintiff longshoreman, who was working on the dock. Circuit Judge Friendly, sitting by designation, citing Mitchell, Petterson, and Grillea, held that the unsafe method of unloading the lumber rendered the equipment unseaworthy.

In Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (2d Cir. 1950), the longshoremen crew was attempting to lift a heavy metal "pontoon" from the dock by fastening it with two "bridles" to the ship's winches, booms and falls. The pontoon fell and struck a longshoreman who was assisting in the operation. According to the Court's opinion:

> "Each 'bridle' consisted of two lengths of wire cable, each length having a hook at one end, and the other end being fastened to a single common ring. Each hook was passed into a 'slot' at one corner of the 'pontoon,' and the common ring was passed into the hook at the end of the fall. In this way each 'bridle' could lift the 'pontoon' at two of its corners, and two 'bridles' could lift it at all four corners. Instead of making the two rings fast to each other, so as in effect to make a single 'bridle' with four lengths of wire, the rings were left separate on the hook; and in consequence after the winch had lifted the 'pontoon' a short distance from the dock, it tilted, the two rings separated and one of them slipped out of the hook, dropping one end of the 'pontoon.'"

The Court held that the use of two "bridles" instead of one was unsuitable for the purpose, and made the ship's gear pro tanto unseaworthy. If the use of two bridles instead of one was unsuitable for the purpose of raising the "pontoon" into place, then certainly while loading the defendant's cargo, the dangerous method of bumping gondola cars into position under the hammer as utilized in this case was unsuitable for that purpose.

Moreover, the jury heard the testimony of expert witnesses in the case and had the opportunity of hearing Mr. John Stange, a longshoreman and supervisor of longshoremen for more than forty-five years. He was asked, "Do you have an opinion as to the reasonable safety of using three loaded cars to bump or push No. 3 car under the hammer?" He answered, "Yes . . . well, the three cars shouldn't hit the one car that is one thing . . . Because they are too heavy, and they gain more weight in momentum, and when they hit the Car No. 3, which was loaded with plate, why it is like hitting a brick wall." He then, in answer to a question, enumerated four different methods or devices "other than using the ship's gear which can safely and adequately move railroad cars into the car-spotting position." With this testimony before it the jury could and did properly find, from the facts, that the method used to load the ship's cargo created an undue risk to those called upon to load it, making the vessel unseaworthy, and that the unseaworthiness was the cause of Thompson's injury. See Hagans v. Ellerman & Bucknall Steamship Company (supra).

As to the negligence phase of the case, the jury was justified in returning a verdict in favor of the plaintiff on the theory that the defendant was negligent in not furnishing plaintiff with a safe place to work.

The defendant contends that it had no control over the pier and thus could not be responsible for an injury occurring thereon. In Gutierrez (supra), the United States Supreme Court refused to find that any failure to control

the pier would exculpate the vessel owner from his non-delegable duty to furnish longshoremen working in the service of his vessel a safe place to work. The Court went on to say: "The man who drops a barrel out of his lift need not control the sidewalk to be liable to the pedestrian when the barrel hits." Defendant allowed the cargo to be loaded in a dangerous and defective manner. The night mate was in charge of the vessel and witnessed the operation resulting in this accident. "The shipowner has a duty not to permit its ship's unloading activities, which can affect people on the pier, to be carried on in such a way that subjects those people in the area of these activities to an unreasonable risk of harm." Fisher v. United States Lines Company, 198 F. Supp. 815 (E.D. Pa. 1961). In Beard v. Ellerman Lines, Ltd., 289 F.2d 201 (3d Cir. 1961), this Court pointed out that "It is settled law that Ellerman owed to Beard the obligation to provide him with a safe place to work, and its failure to do so constituted negligence. It is equally settled that Ellerman was under a duty to use methods which complied with the standard of reasonable care in the discharge of its cargo, and to forbid the use of a discharge method by the stevedore of its selection, which did not conform to a standard of reasonable care." The standard of reasonable care required in discharging the cargo also applies with equal force to the loading of the cargo. Defendant had an absolute and non-delegable duty of care toward the plaintiff not to create this risk to him, which it failed to meet. When this lack of care culminated in plaintiff's injury, defendant became legally liable to compensate him for the harm. See Gutierrez v. Waterman Steamship Corporation (supra).

The defendant further complains that the trial court erred in rejecting the testimony of witnesses Shields and Hedemann. The purpose of Shield's testimony was to attempt to show that the work being done by plaintiff was not work which had been performed traditionally by the

ship's crew. That the work inextricably associated with the loading of the vessel is, as a matter of law, the work of the ship's service, was clearly established in Hagans (supra), and recently confirmed in Gutierrez (supra). Consequently, the testimony of Shields would do no more than confuse the jury and was properly excluded. As to the witness Hedemann, a pre-trial order gave the defendant leave to amend its pre-trial memorandum by adding the names of expert witnesses. The defendant filed a supplemental pre-trial memorandum designating Hedemann as a witness. This clearly implied that he was to be an expert witness. At the trial of the case he was called as a factual witness, purportedly to testify that he arrived at the scene of the accident immediately after it happened and when he asked what had happened he was told by one of the longshoremen that Thompson slipped off the platform while trying to apply the brake and that the ship's gear was not involved. Plaintiff's plea of surprise was well taken. The witness was an employee of a subsidiary of the same parent corporation as is the defendant and was on duty at the time of the accident. The very next day the scene was visited by appellant's counsel and a court reporter who took statements from a number of witnesses, including members of the crew and the stevedore gang. Hedemann was not referred to in any of the answers to interrogatories, although if he were a factual witness, a number of interrogatories would have required that he be identified. The opinion of the District Court adequately handles the question and is, in part, adopted here:

> "Under our Rules such a factual dispute must have been specified in the pretrial memorandum. This was not done. Moreover, the defendant's answer to plaintiff's interrogatory No. 1(a) alleged that 'defendant has information that plaintiff was injured when he fell from a railroad car and was run over by that car or another'. There plaintiff had every right to rest

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,410

JAMES THOMPSON

v.

CALMAR STEAMSHIP CORPORATION,
Appellant

ON PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH, *Circuit Judges*, and NEALON, *District Judge*.

OPINION OF THE COURT

(Filed May 20, 1964)

PER CURIAM.

The petition for rehearing will be denied.

HASTIE, *Circuit Judge*, with whom SMITH, *Circuit Judge*, joins, dissenting.

Under this decision "unseaworthiness" becomes a liability-imposing word without rational meaning or conceptual scope.

Heretofore, to me at least, unseaworthiness has signified some unfit, unsound or unsafe condition of a vessel or its gear or equipment. A vessel may be unseaworthy because of a structural defect, or because it is improperly manned or because its equipment is defective or inadequate in some way. But, as I understand the facts in this case, the vessel and its gear were not defective in any way. The winch and cable, part of the ship's gear, involved in this accident, were sound and worked perfectly. The trouble was that stevedores, not in the employ of the ship, negligently undertook to move one railroad car from its unloading position on the pier alongside the ship by bumping it with a train of oncoming cars. They used the ship's winch and cable to put the bumping cars in motion. This procedure may well have been active negligence by the stevedores, but it involved no structural or operational defect of the gear, and no unfitness to move cargo carrying cars. If a ship is to be liable for any negligence of a stevedore or any other third person in misusing its gear, I think the court should say so and should offer some justification other than an anomalous characterization of the gear as unseaworthy.

I think the Supreme Court has never supported a finding of unseaworthiness which could not be rationalized as involving some structural or functional unfitness of vessel or gear for its intended use. If any decision of an inferior court goes as far as this one, we certainly are not obligated to follow it.

Unable to find any satisfactory rationalization for this decision or to comprehend its scope, I fear that the bar and the maritime community will find that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore has seemed clear that no liability existed. Does this decision mean that when a pilot negligently maneuvers a ship against a bridge or a pier, the steering apparatus is unseaworthy? If a stevedore negligently allows tackle to fall

to the deck injuring someone, is the gear unseaworthy? If one passenger injures another by carelessly using some sports equipment supplied by the ship, is this equipment unseaworthy? If it seems ridiculous to apply the concept of unseaworthiness to such cases as these, I think the incongruity lies not with the choice of examples but with the present decision which seems to embrace all such situations.

In my judgment, there should be a rehearing of this appeal before the court en banc to permit full consideration whether we wish to make this puzzling extension of liability without fault and, if so, to provide a rationalization of our ruling and some definition of its scope.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,410

JAMES THOMPSON

v.

CALMAR STEAMSHIP CORPORATION,
Appellant

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*, and NEALON, *District Judge*.

The petition for rehearing filed by Calmar Steamship Corporation, Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

HASTIE and SMITH, *Circuit Judges*, would grant rehearing.

ATTEST:
IDA O. CRESKOFF,
Clerk.

Dated: May 20, 1964

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IN THE

Supreme Court of the United States

October Term, 1964.

No. 398.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

v.

JAMES THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States.

No. 398.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

v.

JAMES THOMPSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The District Court denied petitioner's motions for judgment n.o.v. or for a new trial by an order and opinion reported as 216 F. Supp. 234. The opinion of the Court of Appeals for the Third Circuit is reported in 331 F. 2d 657. Petition for rehearing before the Court en banc was filed and denied on May 20, 1964.

JURISDICTION.

It is not disputed that there is jurisdiction under Title 28, U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

I. When a member of a longshoremen's gang is engaged in loading steel from a railroad car on the pier into the vessel alongside, by means of the ship's winch and cables, and is injured while moving the cars alongside the vessel:

(a) Is not the vessel rendered unseaworthy under the applicable decisions of this Court, in the *absence of proper equipment* when the cars were moved by a *dangerous and unsafe method,* creating an unreasonable hazard to a member of the longshore gang?

(b) Is not a longshoreman engaged in loading a vessel protected by the warranty of seaworthiness as a matter of law, under the applicable decisions of this court, precluding testimony as to whether loading a vessel is seamen's work?

(c) Has this Court not already settled the question that the application of the maritime law to an injury sustained by a longshoreman on the dock while engaged in loading a vessel is constitutionally proper?

HISTORY OF THE CASE.

Thompson was an integral member of the longshore gang loading steel from freight cars into defendant's vessel, "Alamar", alongside. Part of the gang were on the vessel and part on the pier. Plaintiff was on the pier assigned to attach the ship's hook to the drafts of steel in the freight cars, which thence were hauled up into the ship's holds (28a, 29a). As no shifting engines were available during the late evening and early morning hours, it was necessary to use the ship's bull winch and bull line, to move railroad cars where they could be spotted under the head of the ship's boom (33a, 45a).

At the time plaintiff was injured there were three cars in the vicinity of the ship's No. 1 hatch and three loaded cars in the vicinity of the No. 4 hatch. The first car was empty; the second car had just been emptied and was still under the head of the boom; the third car was heavily loaded with steel and it was this car which had to be moved under the head of the ship's boom (31a). In the absence of proper special equipment for moving the cars, the longshoremen under the surveillance of the ship's ranking officer (185b, 194b) ran a bull line from the bull winch of the ship's No. 3 hatch to car No. 4, and, by surging the winch so that maximum power could be achieved, propelled three loaded cars further down the pier as a battering ram to strike the three cars in the vicinity of the ship's No. 1 hatch so as to drive them forward so that the third loaded car would be "spotted" under the head of the ship's boom for loading into the vessel (33a, 71b, 59a, 53b, 57b, 58b, 24b). This method was successful in starting the cars but, once started there was no control to stop the cars except a man stationed on the car to "brake" it as it came under the ship's boom. Plaintiff was assigned to "brake" the cars (68a). The battering ram hit the car on which plaintiff was standing with such tremendous force that he was knocked

off his perch to the track on the pier where the car wheels passed over and amputated his left leg (70a, 99b).

Qualified experts testified that the propelling of the railroad cars by the ship's cables and winches, as a battering ram, under the circumstances, was a highly dangerous method and that the job could have been done safely with proper equipment, which was not available (86a, 116b, 106a, 107a, 108a).

Petitioner, in the course of the trial, proffered a witness to prove that loading and unloading a vessel was never a seaman's work and, therefore, the warranty of seaworthiness was inapplicable. The Trial Judge held that the work of loading and unloading a vessel was seaman's work as a matter of law and excluded that testimony. The case was submitted to the jury on theories of negligence and unseaworthiness. The jury returned a general verdict in favor of the plaintiff.

REASONS WHY PETITION SHOULD BE DENIED.

I. The Decision of the Court Below in Upholding the Finding of the Jury in Favor of the Respondent That the Vessel Was Unseaworthy Is Not in Conflict With the Decisions of This Court and Other Appellant Courts and Represents a Correct Statement of the Applicable Law.

Plaintiff bottomed his complaint of unseaworthiness on the ground that the vessel had failed to provide proper and safe equipment and employed a dangerous method to "spot" the cars under the head of the ship's boom.

That an improper method of loading or unloading a vessel can render the vessel unseaworthy is now a well-established doctrine. As the opinion of the Court below stated, it was so recognized in *Morales v. City of Galveston*, 370 U. S. 165, 170, 8 L. Ed. 2d 412, 416. Judge Friendly of the Court of Appeals for the Second Circuit specially designated as the Trial Judge and the finder of fact found that an improper and unsafe method of unloading lumber from a vessel rendered that vessel unseaworthy. *Robillard v. A. L. Burbank Co., Ltd.*, 186 F. Supp. 193 (S. D. N. Y., 1960). This case was cited with approval by this Court in *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 214, 10 L. Ed. 2d 303.

Petitioner cites in opposition to this concept, this Court's decision in *United New York and New Jersey Sandy Hook Pilots' Association v. Halecki*, 358 U. S. 613 (1959). Petitioner's reliance on the *Halecki* case is utterly misplaced. In that case the vessel was in a shipyard for its annual overhaul, including specialized spraying of the ship's generators with a highly toxic compound which this Court held was not the work of seamen protected by the warranty of seaworthiness. That case does not stand for the proposition claimed by Petitioner that an unsafe method of operation could not render the vessel unseaworthy.

The other cases cited by petitioner to indicate conflict among the appellate courts are clearly distinguishable in that they related to isolated episodes of negligent use of an otherwise proper tool. In *Arena v. Luckenbach Steamship Co., Inc.*, 279 F. 2d 186 (C. A. 1, 1960), the rolls of paper fell because the nets permanently attached to the pallet or loading tray were not tied. Thus the Court found that the tool utilized was not defective, but that the accident occurred because the longshoreman who loaded this particular pallet had not tied the lanyards of the net. The plaintiff's contention that end-boards could have prevented this accident was rejected by the Court because there was no evidence to support the unavailability of such end-boards. F. 2d 188.

In *Guarracino v. Luckenbach Steamship Co.*, 333 F. 2d 646 (C. A. 2, 1964), the Court of Appeals for the Second Circuit expressly held that its decision in the *Guarracino* case is readily distinguishable from the instant case emanating from the Third Circuit. Guaraccino was injured as he attempted to leave the vessel by climbing over the cargo at the same time that there were fixed and portable ladders available to permit the safe egress from the hatch. As the Court pointed out:

> "The case is readily distinguishable from the recent decisions of the Third Circuit, brought to our attention by libellant's counsel after oral argument, that espouse the view that the longshoremen's negligent use of the ship's equipment to create an unsafe condition may make the ship unseaworthy."[1]

The same distinction would be equally applicable to the other two cases cited by the petitioner, which emanated from the Second Circuit: *Massa v. C. A. Venezuelan Navigacion, et al.*, 332 F. 2d 779 (C. A. 2, 1964) and *Puddu v. Royal Netherlands Steamship Company*, 303 F. 2d 752 (2

1. *Ferrante v. Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964); *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir. 1964).

Cir. 1962), cert. den. 371 U. S. 841. In *Massa* the accident occurred because the longshoreman placed the tongs of the ship's gear in the wrong holes of a pallet. This certainly could not be equated with an improper method of conducting a certain activity.

In the *Puddu* case, the District Judge sitting without a jury, found as a fact that the accident was caused by the manner in which the stevedore gang raised a rain tent so that the falls of the winches were stretched to an angle of almost 180 degrees, which is a maneuver called "high-lining" and which resulted in an unusual and dangerous stress on the boom which was found to be the sole cause of its collapse. Unlike the instant case, there was no contention that the particular tool was unsafe or inadequate. Of the utmost significance in this respect is the fact that the trial judge sat without a jury and his findings, under these circumstances, cannot be reversed unless clearly erroneous. *McAllister v. United States,* 348 U. S. 19, 20, 99 L. Ed. 20 (1954).[2]

Billeci v. United States, 298 F. 2d 703 (C.A. 9, 1962) is also readily distinguishable from the instant case by the same criteria. There was no question in *Billeci* that the proper tool was being utilized but that the operator of the winch had negligently not inserted a locking pin which was the only means by which the boom could be locked into position. When it was not utilized, the hatch board being transported fell. There was no testimony that a locking pin was not available to hold the boom in place. On the contrary, the testimony was that the locking pin was readily available, and because of an isolated episode of negligence, was not so utilized.

Blankenship v. Ellerman's Wilson Line New York, Inc., 265 F. 2d 455 (C. A. 4, 1959), is not applicable because the

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2. It is significant that in another case arising out of the same accident in which Puddu was a victim under the same facts, tried with a jury, the winchman, D'Agosta, recovered and subsequently held a favorable jury verdict on the issue of unseaworthiness. 303 F. 2d 756.

plaintiff contended that there was improper lighting in the holds which contention was rejected by the jury when the jury made an equivocal finding that either the vessel was seaworthy, or that if it was unseaworthy it did not contribute to the accident of the plaintiff.

Edwards v. Steinns, 207 F. 2d 734 (C. A. 4, 1953), cited by the petitioner, stands for the singular proposition that a charge by the Court, that the defendant shipowner could not be held liable if the winch was in good working condition and the accident was caused by the stevedores who operated the winch, was not improper. As a bare proposition of law, it may be somewhat questionable since *Grillea* and *Crumady*.[3] However, to the extent that it refers to an episode of negligence and the use of an otherwise proper tool, it furnishes no basis for conflict with the instant case.

The doctrine of the warranty of seaworthiness was carefully analyzed by the Third Circuit Court of Appeals in *Mesle v. Kea Steamship Corp.*, 260 F. 2d 747, where the Court, after reviewing the many cases on the subject said: ". . . that the ship owner having knowledge, actual or constructive, that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity; liability is imposed for failure to comply with that duty, termed one of making the vessel seaworthy" (p. 751).

II. The Trial Court Properly Excluded Testimony as to the Historical Basis for Extending the Warranty of Seaworthiness to Longshoremen.

The petitioner complains that he has been denied his rights under the Seventh Amendment of the Constitution because the Trial Court refused the testimony relating to

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3. *Grillea v. United States*, 232 F. 2d 919, 1956 AMC 1009 (C. A. 2, 1956); *Crumady v. The Joachim Henarick Fisser*, (1959) 358 U. S. 423, 3 L. ed. 2d 413, 79 S. Ct. 445, 1959 AMC 580.

the historical antecedents of that concept of law which extends the warranty of seaworthiness to longshoremen in the service of the vessel.

In *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 214, 10 L. Ed. 2d 297, 303, 304, and *Hagans v. Ellerman and Bucknall Steamship Co.*, 318 F. 2d 563 (C. A. 3, 1963), this precise question was laid to rest. The warranty of seaworthiness is extended to longshoremen on the pier where the longshoreman is an integral member of the gang loading and unloading the vessel. In the instant case, Thompson was such a member being charged with the responsibility of hooking on the steel in the railroad car to be directly hoisted aboard the vessel.

It is significant to note that the factual situation, in both *Hagans, supra,* and *Gutierrez, supra,* is that the injured longshoreman was not injured by an instrumentality physically affixed to the vessel. It is submitted that the facts of the instant case, where the appellee was injured by an instrumentality so affixed to the vessel and from which it derived its motive power, are much more compelling.

The Jones Act cases cited by the petitioner are inapposite in that they concern themselves with remote factual issues where the nature of the employment was such as to cast doubt on the employees status and raised the question as to whether the individuals involved were members of the crew or harbor workers.

Apart from these rare instances where the seaman's status may be challenged as a matter of fact, as a general rule in the Jones Act cases, the injured party is held to be a member of the crew as a matter of law, *Lawrence v. Norfolk Dredging Company* 319 F. 2d 805, cert. den. 11 L. Ed. 2d 313. So it is with longshoremen engaged in loading and unloading vessels. While so engaged they are "Seamen" as a matter of law, *Seas Shipping Company v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099; *Gutierrez v.*

Waterman S. S. Corp., 373 U. S. 214, 10 L. Ed. 2d 303; *Hagans v. Ellerman and Bucknall Steamship Co.*, 318 F. 2d 563, 571.

Petitioner stresses *Partenweederei, MS Belgrano v. Weigel*, 299 F. 2d 897 (1962) as being to the contrary. An examination of that case leads to a different conclusion. In that case the worker was a pier worker who, the Court said, never came into contact with the ship's tackle and, therefore, was not in the ship's service. This holding has since been clearly overruled by this Court's Decision in *Gutierrez, supra;* but, in any event, the distinction made by the Court in that case makes it inapplicable here since the plaintiff in the instant case was directly concerned with the ship's equipment and, inter alia, was actually engaged in attaching the ship's hook to the steel in the box cars.

In an effort to hoist itself up by its own bootstraps, Petitioner's counsel and the alleged expert who sought to testify that loading and unloading a vessel was never seamen's work, co-authored an article[4] purporting to demonstrate that proposition. They then made the same argument in a legislative inquiry (H. R. 207) charging this Court with adopting a "myth" in holding that loading and unloading a vessel is seamen's work. The hearings on that Bill developed a review of the law which left no question whatever that the work in question has been done by the seamen since the earliest days of merchant shipping. See Merchant Marine and Fisheries committee hearings, 87th Congress, 2nd Session—H. R. 207—Part II, Feb. 20-21, 1962, pages 150 to 154. Petitioner now attempts to use the same argument here and to buttress it with his own article. A review of the reply, as set out in the foregoing legislative inquiry, effectively refutes that argument.

The Court below was clearly correct in excluding the testimony of the "expert" under the circumstances. To

4. 111 Univ. of Penna. Law Review, 1137.

do as Petitioner requested would do incalculable violence to the maritime law.

It is the enlightened rule in the *Sieracki* and *Gutierrez* decisions that petitioners would subvert by their collateral attack upon the accuracy of the historical basis of one of the foundations of those decisions. The observations of this Court need no defense. They rest firmly upon a historical foundation of maritime practice rooted in antiquity and followed throughout the centuries to modern times.

III. The Maritime Law Is Constitutionally Applicable to the Case at Bar.

The situs of a tort of itself will determine whether or not it is maritime. *The Plymouth,* 70 U. S. (3 Wall.) 20, 36, 18 L. Ed. 125 (1865); *State Industrial Comm'n v. Nordenholt Corp.,* 259 U. S. 263, 271, 42 S. Ct. 473, 66 L. Ed. 933 (1922); *Atlantic Transport Co. v. Imbrovek,* 234 U. S. 61.

That there is no constitutional bar to other equally valid concepts of admiralty jurisdiction was firmly set forth in *O'Donnell v. Great Lakes Dredge and Dock Co.,* 318 U. S. 42, 43. The Supreme Court there pointed out that the seaman's cause of action, either as implemented by statute as in the Jones Act (46 U. S. C. A. 688) or non-statutory as in the case of maintenance and cure, is within the admiralty jurisdiction of the courts because such admiralty jurisdiction "depends not on the place where the injury is inflicted but on the nature of the service and its relations ip to the operation of the vessel plying in navigable waters."

The revered Judge Learned Hand, in *Strika v. Netherlands Ministry of Traffic,* 185 F. 2d 555, 557, stated:

> ". . . the defendant argues that since an action upon such an implied warranty is only a tort, the maritime law can have no jurisdiction over a breach of it occurring upon land; that being, of course, an ac-

> cepted constitutional limitation upon maritime law. We should have found this a serious obstacle, were it not for O'Donnell v. Great Lakes Dredge & Dock Co., supra, and the ratio decidendi of Swanson v. Marra Brothers, Inc., supra; but those decisions appear to us to settle it that such a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land. . . ."

While the decision in Strika was not based upon the Extension of Admiralty Jurisdiction Act, 46 U. S. C. 740, Judge Hand points out that this Act should certainly allay all doubts as to the perimeter of admiralty jurisdiction extending beyond the waterline in tort.

Chief Judge Biggs' writing in *Weinstein v. Eastern Airlines, Inc.*, 316 F. 2d 758, cert. den. 375 U. S. 940 stated:

> "Concepts of admiralty tort jurisdiction should not and cannot remain static and unchanging. In Detroit Trust Co. v. The Thomas Barlum, 293 U. S. 21, 52, 55 S. Ct. 31, 41, 179 L. Ed. 176 (1934), the Supreme Court, by Mr. Chief Justice Hughes, stated: 'We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of Jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters.' See also McGuire v. City of New York, 192 F. Supp. 866, 871 (S. D. N. Y. 1961)."

The instant case acquires jurisdiction under the general maritime law as enunciated by Judge Learned Hand. In addition, the fact that the ship itself was the precipitating factor which catapulted the railroad cars into the car on which plaintiff was standing with the tragic result

would invoke jurisdiction under the Admiralty Extension Act, 46 U. S. C. A. 740. It was the vessel which clearly committed the tort on the pier.

CONCLUSION.

Upon the foregoing considerations, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY.

Preliminary Statement.

It is regrettable that in this Court it seems necessary to correct a statement in respondent's brief in opposition which would, if taken as written, mislead the Court upon a fact which might be important to the outcome of the case. At Page 3 of respondent's brief, the following statement appears:

> "In the absence of proper special equipment for moving the cars, the longshoremen under the surveillance of the ship's ranking officer [185b, 194b] ran a bull line from the bull winch of the ship's No. 3 hatch to car No. 4 and by surging the winch, . . . etc."

The record will not support the impression the respondent seeks to create, either at the pages cited or any other place. A mooring line [the subject of the testimony at 185b] is not even remotely similar to the bull wire used by the longshoremen in this case. The clear testimony, from respondent's own witnesses is that they did not recall any ship's officer "around the deck" at the time this car was moved [62a], they received no orders or directions from ship's officers relative to the car movement [62a], and that the instructions relative to movement of the railroad car came from respondent's fellow employee, Goldstein [32a, 41a, 47a]. Any participation, surveillance or knowledge of any ship's officer of the proposed method of moving the rail car is completely negated by the record. Thus negligence on the part of petitioner cannot be supported from the record.

ANSWER TO RESPONDENT'S ARGUMENT.

Respondent artfully ignores those features of the case at bar which place the decisions below in such sharp conflict with the decisions cited in the petition. That the method adopted by the independent contractor to move railroad cars was an improper method does not, by any means, demonstrate respondent's essential thesis that there was any "failure [of petitioner] to provide proper and safe equipment". That is the main point made by the dissent below. There was no evidence and no finding of anything improper about the ship's equipment—it was the poorly conceived method of using it which was unsafe and dangerous. The line from the No. 3 winch could have been led to a block placed forward of the car to be moved and there would have been no need for the bumping of one car by another. Pulling one car at a time had the blessing of respondent's expert witness, Stange [103a] and his counsel [170a]. The ship's other winches were likewise available [191b].

Thus, on the record before this Court, respondent has not and cannot distinguish *Massa* [332 F. 2d 779 (C. A. 2, 1964), petition for certiorari pending, No. 447]; *Puddu* [303 F. 2d 752 (C. A. 2, 1962)]; *Guarracino* [333 F. 2d 646 (C. A. 2, 1964)]; *Spinelli* [326 F. 2d 870 (C. A. 2, 1964), cert. denied May 18, 1964, — U. S. —, 84 S. Ct. 1338].

In each of these cases, an improper *method* of work aboard ship did not create unseaworthiness liability in the absence of improper ship's gear or equipment.

More significant than any other thing about respondent's opposition, however, are the cases he cites and the distinctions he draws. In the case at bar the injury occurred ashore, the improper and dangerous method was something executed ashore and involved vehicles used and usable only ashore. There was nothing whatsoever defective, improper or dangerous about the respondent's ship and no improper act was done by the ship or upon it. All

of the cases upon which respondent relies involved injuries aboard ship or acts aboard ship which resulted in injury ashore.

An analogy might be drawn between a man shooting a gun while on board a ship. He wounds a victim ashore. A second man shoots a gun on shore and wounds a victim on shore. One can see some maritime connection in one case but none in the other.

The decision below is novel and important. Already other actions based upon it have been instituted and are pending in the district courts. Thorough examination of the pros and cons by this Court is urgently required to avoid the confusion and doubt engendered by conflicting rulings and, more important, by conflicting concepts. It is interesting and significant to note Page 11 of respondent's brief wherein he flatly states: "The situs of a tort of itself will determine whether or not it is maritime", citing abundant authority for the statement.

Thus respondent seems to concede error below and the writ should be granted.

Respectfully submitted,

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